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IN THE
COURT OF APPEALS OF INDIANA

DAVIESS COUNTY DEVELOPMENT COMPANY, INC.,	)	
Appellant- Defendant,	)	
vs.	)	No. 14A05-0601-CV-5
HENRY WITTMER,	)	
Appellee- Plaintiff.	)	

APPEAL FROM THE DAVIESS CIRCUIT COURT
The Honorable Robert L. Arthur, Judge
Cause No. 14C01-0408-PL-262

October 19, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Daviess County Development Company, Inc., ("DCDC") appeals from the trial

court's grant of summary judgment to Henry Wittmer, and denial of its own motion for summary judgment in Wittmer's action to quiet title to certain real estate in Daviess County previously owned by DCDC and purchased by Wittmer at a tax sale. DCDC raises several issues for our review, which we consolidate and restate as whether the trial court properly ruled on the parties' respective motions for summary judgment. Concluding that the tax sale notices sent by Wittmer were statutorily sufficient and comported with due process, we affirm the trial court's grant of summary judgment to Wittmer.

Facts and Procedural History[1]

Wittmer and his brother-in-law, Dr. Richard Graber, were founding members and stockholders of Paoli Peaks, Inc., which ran a skiing operation in Paoli, Indiana. Wittmer and Dr. Graber were married to twin sisters.

In April 1996, Paoli Peaks, Inc., ("Paoli Peaks") purchased approximately ninety acres in two separate parcels in Montgomery, Indiana, known as "Grannan Farm." In 1997, Paoli Peaks sold its Paoli skiing operation and its name to a Missouri corporation, changing its name thereafter to Daviess County Development Corporation, Incorporated. Grannan Farm was not part of the sale and remained an asset of DCDC. At the time of the sale, Wittmer was a director and owned 1,000 shares of DCDC. He also worked as a manager for the company.

In the fall of 1997, Wittmer sold his shares in DCDC, and a few months later, resigned his employment with the company. Dr. Graber continued to own an interest in DCDC until

[1] We direct DCDC's attention to Indiana Appellate Rule 46(A)(10) which requires an appellant's brief to "include any written opinion, memorandum of decision or findings of fact and conclusions thereon

his death in 2000, after which Dr. Graber's widow and/or family continued to own DCDC shares.

Property taxes on Grannan Farm became delinquent, and in August 2002, the Daviess County Auditor sent out notices of a tax sale of the farm.[2] Wittmer purchased a tax sale certificate for Grannan Farm at the tax sale for $15,000. At the tax sale, Wittmer and Glen Graber[3] agreed to split the cost of any winning bids they made at the sale. Glen provided half the cash for the purchase of the Grannan Farms tax certificate pursuant to this agreement, but the property was bought in Wittmer's name alone. Wittmer hired counsel to send the statutorily required notices announcing the purchase and redemption period. Notices were addressed to DCDC at P.O. Box 67, Paoli, Indiana, and P.O. Box 7, Montgomery, Indiana. Those are the addresses on file with the Indiana Secretary of State's Office for DCDC. In addition, notices were sent to Paoli Peaks at P.O. Box 64, Paoli, Indiana, and 17409 Hidden Valley Drive, Eureka, Missouri. Paoli Peaks at P.O. Box 64 was the name and address listed for the owner of the property in the Auditor's records.[4] With respect to the addresses, DCDC stated at the summary judgment hearing that "ours was 64, and 67 is the new Paoli Peaks."[5] Tr. at 32. At the expiration of the redemption period, Wittmer's counsel sent notices of the

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relating to the issues raised on appeal."

[2] Because the farm was held in two separate parcels, two tax sale notices were sent. Likewise, two tax sale certificates were issued to Wittmer and he sent two of each of the required notices, identical except for the property description. Two tax deeds were also issued.

[3] Glen Graber is, at most, a distant relation of Dr. Graber's.

[4] Notices were also sent to The National City Bank of Evansville, which held the mortgage on the property.

[5] No explanation was offered for how or why the Secretary of State came to have P.O. Box 67 on file as an address for DCDC.

filing of a petition for issuance of a tax deed to the same addresses. Wittmer did not contact Dr. Graber's widow, his sister-in-law, to ascertain whether any of these addresses was the correct address for DCDC. He did, however, contact Robert Seybold, a former employee of DCDC and a current employee of Paoli Peaks, and in the course of the conversation, asked if Paoli Peaks had received notice. The property was not redeemed, and tax deeds were issued to Wittmer in February of 2004.

On August 3, 2004, Wittmer filed a complaint to quiet title to Grannan Farm against DCDC.[6] Both Wittmer and DCDC filed motions for summary judgment. Following a hearing, the trial court granted Wittmer's motion, denied DCDC's, and quieted title in Wittmer. DCDC now appeals.

Discussion and Decision

I. Summary Judgment Standard of Review

On appeal from a grant of summary judgment, our standard of review is the same as that of the trial court. Wilcox Mfg. Group, Inc. v. Mktg. Servs. of Indiana, Inc., 832 N.E.2d 559, 562 (Ind. Ct. App. 2005). We stand in the shoes of the trial court and apply a *de novo* standard of review. Id. Our review of a summary judgment motion is limited to those materials designated to the trial court. Robson v. Texas E. Corp., 833 N.E.2d 461, 466 (Ind. Ct. App. 2005), trans. denied; Ind. Trial Rule 56(H). Summary judgment is appropriate only

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[6] Although the parties' briefs are less than clear on the precise procedural history of this case, it appears that DCDC filed a "Motion for Relief from Orders" in the tax deed proceeding following the filing of Wittmer's complaint to quiet title in this cause. Along with its Answer in this case, DCDC filed a motion to stay litigation in this cause pending resolution of its motion for relief in the tax deed cause. No ruling was ever made on the motion to stay, and DCDC thereafter filed a motion to consolidate the two causes. No order was ever entered on the motion to consolidate and apparently the motion for relief has never been resolved.

where the designated evidence shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). For summary judgment purposes, a fact is "material" if it bears on the ultimate resolution of relevant issues. Wilcox Mfg. Group, Inc., 832 N.E.2d at 562. We view the pleadings and designated materials in the light most favorable to the non-moving party. Id. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. Troxel Equip. Co. v. Limberlost Bancshares, 833 N.E.2d 36, 40 (Ind. Ct. App. 2005), trans. denied. "'The fact that the parties [made] cross-motions for summary judgment does not alter our standard of review. Instead, we must consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law.'" Diversified Invs., LLC v. U.S. Bank, NA, 838 N.E.2d 536, 539 (Ind. Ct. App. 2005), trans. denied (quoting Ind. Farmers Mut. Ins. Group v. Blaskie, 727 N.E.2d 13, 15 (Ind. Ct. App. 2000)).

A trial court's grant of summary judgment is clothed with a presumption of validity, and the party who lost in the trial court has the burden of demonstrating that the grant of summary judgment was erroneous. Wilcox Mfg. Group, Inc., 832 N.E.2d at 562. We will affirm upon any theory or basis supported by the designated materials. Troxel Equip. Co., 833 N.E.2d at 40. When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. Id.

II. Tax Sales

As explained by our supreme court in Tax Certificate Invs., Inc. v. Smethers:

> A purchaser of Indiana real property that is sold for delinquent taxes

> initially receives a certificate of sale. Ind. Code § 6-1.1-24-9. A one-year redemption period ensues. Ind. Code § 6-1.1-25-1; Ind. Code § 6-11-25-4. If the owners fail to redeem the property during that year, a purchaser who has complied with the statutory requirements is entitled to a tax deed. Id. The property owner and any person with a "substantial property interest of public record" must each be given two notices. Ind. Code §§ 6-1.1-25-4.5, -4.6.
>
> The first notice announces the fact of the sale, the date the redemption period will expire, and the date on or after which a tax deed petition will be filed. Ind. Code § 6-1.1-25-4.5. The second notice announces that the purchaser has petitioned for a tax deed. Ind. Code § 6-1.1-25-4.6.

714 N.E.2d 131, 133 (Ind. 1999). "A tax sale is purely a statutory creation, and material compliance with each step of the statute is required." In re Sale of Real Prop. with Delinquent Taxes or Special Assessments, 822 N.E.2d 1063, 1070 (Ind. Ct. App. 2005).

An order to issue a tax deed will only be given if a court finds that notice has been provided pursuant to the statutes. Ind. Code § 6-1.1-25-4.6(b)(4). Thus, issuance of a tax deed creates a presumption that a tax sale and all of the steps leading up to the issuance of the tax deed are proper. Diversified Invs., LLC, 838 N.E.2d at 542. This presumption may be rebutted, however, by affirmative evidence to the contrary. Beall v. Mooring Tax Asset Group, 813 N.E.2d 778, 783 (Ind. Ct. App. 2004). For instance, title conveyed by a tax deed may be defeated if the notices were not in substantial compliance with the manner prescribed in accordance with our notice statutes. Id.; see also Ind. Code § 6-1.1-25-16(7).

III. Sufficiency of Notice

A. Is Glen a "Purchaser" Who Must Give Notice?

DCDC first contends that because Glen provided half the money to purchase Grannan Farm at the tax sale, he is therefore a "purchaser" also required to provide the two notices

described above.[7] Glen did not provide any statutory notices regarding the tax sale and is not named as a purchaser in the notices sent by Wittmer. Therefore, DCDC believes the trial court erred in ordering that a tax deed be issued to Wittmer and contends that summary judgment should have been granted in its favor in this case.

Regarding his agreement with Glen, Wittmer testified at his deposition as follows:

> Q: What was the agreement between you and Glenn?
> A: It wasn't much of an agreement other than we know each other and we would – I'd pay half of whatever we had to spend that day and he'd pay half, I guess.
> * * *
> Q: Now, what was your agreement between Glenn Graber and yourself as to the ownership of this real estate?
> A: We were going to clean up the property and sell it. The idea was to make money. . . .
> Q: And what real estate interest did Glenn Graber have in the Grannan farm real estate?
> A: He has a half-interest in it. That was our agreement.
> Q: So you bought it one-half in his name and one-half in your name?
> A: No, we bought it in my name.

Appellant's Appendix at 127-28. The tax sale certificate and tax deed were both issued in Wittmer's name alone. On the face of the legal documents, Wittmer alone purchased and

[7] DCDC actually phrases this as a challenge to the trial court's jurisdiction over the tax deed proceeding. Clearly, the Daviess Circuit Court has subject matter jurisdiction over tax sales and the issuance of tax deeds. See Ind. Code §§ 6-1.1-24-4.6(b) ("Application for judgment and order for sale shall be made . . . to any court of competent jurisdiction . . . ."), 6-1.1-25-4.6(a) ("After the expiration of the redemption period . . . the purchaser . . . may . . . file a verified petition in the same court and under the same cause number in which the judgment of sale was entered asking the court to direct the county auditor to issue a tax deed . . . ."). Moreover, the Daviess Circuit Court has jurisdiction over this action to quiet title. See Ind. Code § 6-1.1-25-14 ("A person who holds a deed executed under this chapter may initiate an action in the court that entered the judgment and order for sale to quiet the title to the property."). Lack of notice does not deprive the trial court of jurisdiction; rather, it defeats the petition for or validity of a tax deed. See Ind. Code §§ 6-1.1-25-4.6(b)(4) ("[T[he court shall enter an order directing the county auditor . . . to issue to the petitioner a tax deed if the court finds that . . . [t]he notices required by this section and section 4.5 of this chapter have been given . . . ."), 6-1.1-25-16(7) ("A person may, upon appeal, defeat the title conveyed by a tax deed executed under this chapter only if . . . the notices required by . . . sections 4.5 and 4.6 of this chapter were not in substantial compliance with the manner prescribed in those sections."). We therefore consider DCDC's actual challenge

became the owner of the property. As such, Wittmer is the only "purchaser" for purposes of the notice statutes, and any agreement he had with Glen does not render the notices deficient in this respect.

B. Were the Notices Statutorily Sufficient?

DCDC contends that Wittmer did not send statutorily sufficient notice because DCDC did not receive the notices, and further, Wittmer not only knew that they would not receive the notices, but also that they in fact did not receive them.

The statute regarding the first notice a purchaser is required to send provides as follows:

> (e) The person required to give the notice under subsection (a), (b), or (c) shall give the notice by sending a copy of the notice by certified mail to:
>
> (1) the owner of record at the time of the:
>
> (A) sale of the property . . .
>
> at the last address of the owner for the property, as indicated in the records of the county auditor; and
>
> (2) any person with a substantial property interest of public record at the address for the person included in the public record that indicates the interest.
>
> However, if the address of the person with a substantial property interest of public record is not indicated in the public record that created the interest and cannot be located by ordinary means by the person required to give the notice under subsection (a), (b), or (c), the person may give notice by publication in accordance with IC 5-3-1-4 once each week for three (3) consecutive weeks.

Ind. Code § 6-1.1-25-4.5(e). The second notice is required to be "given to the same parties and in the same manner as provided in section 4.5 . . . ." Ind. Code § 6-1.1-25-4.6(a).

As noted above, Paoli Peaks at P.O. Box 64 was the name and address indicated in the records of the Daviess County Auditor for the owner of Grannan Farm at the time of the tax

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to be to the sufficiency of the trial court's findings in issuing the order rather than to its jurisdiction.

sale. DCDC acknowledged at the summary judgment hearing that its address was P.O. Box 64. Wittmer sent both notices to this address, and according to our caselaw, "nothing in the statute requires a tax sale purchaser to notify an owner of record by any means other than by certified mail to the address maintained by the county auditor's office." Oliverio v. Chumley, 817 N.E.2d 660, 663 (Ind. Ct. App. 2004). In addition to the address found in the auditor's records, however, Wittmer also sent notices to an alternate address for "Paoli Peaks, Inc.," and to two additional addresses for DCDC found in the Secretary of State's records.

DCDC contends that Wittmer knew notices sent to these addresses would not reach the appropriate people, and, based upon a conversation Wittmer had with Seybold, knew that the notices did not in fact reach the correct people. We acknowledge that Wittmer was in a superior position as opposed to others who might have purchased this property at the tax sale to ascertain the address at which notice would be most likely to reach the owner of record. He was a former officer, shareholder, and employee of the corporation that owned the property, and he was related to a current shareholder. He easily could have picked up the telephone and made an inquiry that required no extraordinary effort on his part. He did not do so, but the fact remains that he did do what is required by statute. See id. ("[T]he current statute . . . does not require any type of inquiry into a property owner's address beyond contacting the county auditor."). Therefore, Wittmer substantially complied with the requirements of sections 4.5 and 4.6.

DCDC makes much of the fact that after notice was sent, Wittmer had a conversation with Seybold. Wittmer and Seybold are acquainted through their previous involvement with DCDC, and Seybold currently works for Paoli Peaks. Several months after the tax sale

Wittmer called Seybold, and in the course of the conversation, "asked him if he had gotten notices . . . ." Appellant's App. at 130. Wittmer thought Seybold said "he forwarded it to the proper address." Id. Seybold testified at his deposition that mail intended for DCDC sometimes came to Paoli Peaks and he would forward it to DCDC at P.O. Box 7 in Montgomery. Id. at 182. We note that it is not surprising that Paoli Peaks received the notices, because notices were specifically addressed to Paoli Peaks as the entity listed as the owner of the property. We cannot infer from Wittmer's question and Seybold's response that Wittmer was intentionally trying to misdirect the notices, or that Wittmer knew the notices intended for DCDC were intercepted, as DCDC alleges. See Darling v. Martin, 827 N.E.2d 1199, 1204 (Ind. Ct. App. 2005) ("It was not incumbent upon [the tax sale purchaser] to make sure that once the notice of tax sale was received, the person who signed for it actually gave it to the [owners].").

DCDC also notes that the return receipts for the first notices show that an employee of Paoli Peaks signed for both the notice addressed to Paoli Peaks at P.O. Box 64 and the one addressed to DCDC at P.O. Box 67, and therefore, Wittmer should have known that the notices did not reach DCDC. In addition, although return receipts were not requested for the second notices, the "Track and Confirm" feature available through the United States Post Office's website shows the notices sent to P.O. Box 64 and P.O. Box 67 were delivered within one minute of each other, from which DCDC infers the same person signed for both. First, we note that DCDC is mistaken as to the requirements of the statute. In its brief, DCDC states that the "statutes require, at a minimum, that notice be delivered to the indicated address. Otherwise, these statutes have no meaning. Why else would there by a

requirement of a mailing by certified mailing with a return receipt – if the receipt itself is meaningless?" Brief of Appellant at 15 (emphasis in original). The statutes, however, only require that the notices be sent by certified mail; a return receipt is not required. See Ind. Code § 6-1.1-25-4.5 ("The person required to give the notice . . . shall give the notice by sending a copy of the notice by certified mail . . . ."); see also In re Sale of Real Prop. with Delinquent Taxes or Special Assessments, 822 N.E.2d at 1072 n.6 ("Certified mail, return receipt requested is different than certified mail. Here, the legislature required only certified mail not certified mail, return receipt requested.") (citations omitted). What the statutes require is that the tax sale purchaser send the notices; they do not require him to show that the notices were actually received. In re Sale of Real Prop. with Delinquent Taxes or Special Assessments, 822 N.E.2d at 1072-73.

Moreover, we note that DCDC acknowledged its address was P.O. Box 64. Notices were sent to that address as required by statute. Aside from what might be inferred from the return receipts – which were not required – DCDC has designated no evidence to support the assertion it did not in fact receive notice. Seybold testified that when he received mail for DCDC, he forwarded it to DCDC at P.O. Box 7 in Montgomery. Wittmer also sent notice to P.O. Box 7 in Montgomery, and that notice was not returned "unclaimed" or "undeliverable" or otherwise. Without some evidence that DCDC did not receive the notice Wittmer sent as required by statute, there is no genuine issue of material fact precluding summary judgment in Wittmer's favor.

C. Did the Notices Satisfy Due Process?

Finally, DCDC contends that the notices sent by Wittmer did not satisfy the requirements of due process.

> Due process does not require that a property owner receive actual notice before the government may take his property. Rather, we have stated that due process requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Jones v. Flowers, 126 S.Ct. 1708, 1713-14 (2006) (quoting Mullane v. Central Hoover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

In Elizondo v. Read, 588 N.E.2d 501 (Ind. 1992), our supreme court addressed the requirements of due process in Indiana tax sale proceedings. The court noted both the Supreme Court's opinion in Mullane and its line of opinions addressing the issue of notice, which have "never disregarded a party's ability to take steps to protect itself." Id. at 504. Therefore, "[a]ll that is required [to satisfy due process] is that the auditor send notice to the owner's last known address, that is, the last address of the owner of the specific property in question of which the auditor has knowledge from records maintained in its office." Id. The court also noted that although it is reasonable to require the auditor to search the records of his own office for other possible addresses for the owner of the specific piece of property at issue, it is not reasonable to require the auditor to speculate when there is nothing to link the alternative address to the property at issue. Id. at 505.[8] The property owner is held

[8] Subsequently, our supreme court applied the same requirements to the notices the tax sale purchaser is responsible for sending, holding that the tax sale purchaser "was entitled to rely on the official property records in complying with the statutory notice requirement." Smethers, 714 N.E.2d at 134.

accountable for ensuring that official property records reflect his or her correct address. Smethers, 714 N.E.2d at 134.[9]

DCDC cites recent United States Supreme Court precedent regarding notice of a tax sale of property. In Jones, the Court held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." 126 S.Ct. at 1713. Jones is distinguishable, as no notices were returned unclaimed in this case, and Wittmer had already taken additional steps to provide notice by sending the notices to more addresses than required by statute. Whatever can be inferred from the signatures on the return receipts or the time of delivery is nothing more than speculation that does not give rise to a duty to do more to assure actual notice. Again, we note that it would have been both easy and considerate for Wittmer to have contacted his sister-in-law, but doing so would not have obviated his statutory obligation to send notice to DCDC's last known address. Because the notice was sent in the manner statutorily prescribed, the notice provided by Wittmer comported with due process.

Conclusion

There exists no genuine issue of material fact regarding the statutory and constitutional sufficiency of the notice provided by Wittmer with respect to the tax sale. The trial court's judgment granting summary judgment to Wittmer is affirmed.

[9] DCDC offers no explanation for why Paoli Peaks' name is still on the property records for DCDC's property. Moreover, as noted above, DCDC offers no explanation for why Paoli Peaks' P.O. Box 67 address is associated with DCDC in the Secretary of State's records. A great deal of the confusion in this case could have been avoided if DCDC had taken steps to ensure accurate information appeared in the public record.

Affirmed.

BAKER, J., and SHARPNACK, J., concur.